Public Service Commission
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July 22, 2005

Marlene H. Dortch
Federal Communications Commission
Office of the Secretary
9300 East Hampton Drive
Capitol Heights, MD 20743

RE: CC Docket No. 98-170
Truth-in-Billing

CC Docket No. 04-208
National Association of State Utility Consumers Advocates' Petition for Declaratory Ruling Regarding Truth-n-Billing

Dear Ms. Dortch:

Enclosed please find an original and four (4) copies of the "Reply Comments of The Public Service Commission of West Virginia" in the above referenced proceedings.

Thank you for your assistance in this matter.

Sincerely,

Christopher L. Howard
WV State Bar I.D. No. 8688

CLH/jb
Attachment
H:\choward\wpdocs\(Docket No. 98-170 FCC Truth-In-Billing)\reply comments.wpd

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter of	)	
	)	
Truth-in-Billing Format	)	CC Docket No. 98-170
	)	
National Association of State Utility Consumers Advocates' Petition for Declaratory Ruling Regarding Truth-in-Billing	)	CG Docket No. 04-208

REPLY COMMENTS OF
THE PUBLIC SERVICE COMMISSION OF WEST VIRGINIA

The West Virginia Public Service Commission (hereinafter referred to as the PSCWV) files these reply comments in general support of the positions taken by the National Association of State Utility Advocates, AARP, the Asian Law Caucus, the Consumer Union, the Disability Rights Advocates, the National Association of State PIRGS, the National Consumer Law Center, the States Attorneys General, et al. that clearly advance the progress of the telecommunications market toward becoming a "competitive market".

After reviewing the comments filed by the various parties in this proceeding, the Public Service Commission of West Virginia especially endorses the comments filed by the States Attorneys General.

I Carrier "Definition of Charges" and "Point of Sale" Issues

To address the issues in this proceeding and all such proceedings before the Federal Communications Commission (FCC) and individual state commissions, the final goal that

we as regulators wish to aspire to must be clearly specified. That goal is often stated as achieving competition in the various telecommunication markets. Unfortunately, it appears that competition is often taken to mean rivalry among carriers rather than approaching as closely as possible a competitive market structure where consumers enjoy the best possible services at the least possible cost. There is no doubt that rivalry among carriers has been achieved, but the progress and promotion of such rivalry has not generally advanced the market conditions consistent with a competitive market model.

Most any economics textbook will set forth the necessary characteristics for a market characterized by "perfect competition" as:

(1) each economic agent is individually unable to affect the market price;
(2) the product/service offered is homogeneous;
(3) there is free entry and exit of resources;
(4) buyers/sellers possess complete and perfect knowledge.

While the ideal of a perfectly competitive market is seldom attainable in the real world, it is easy to see in contrast that often cited evidence of competition in telecommunication markets, such as; rivalry among carriers, attempts at product differentiation, erecting barriers to entry, and controlling the quality of information provided to consumers, is in direct opposition to progress toward a competitive market structure.

The PSCWV believes that the goal of regulators such as state commissions and the FCC should be to promote a competitive market structure whenever possible and this proceeding represents an opportunity to further that goal. A major defect of the current market is the lack of understandable and accurate information being provided to consumers.

Service rates are advertized with an asterisk which may in fine print state that "other surcharges and taxes apply". Consumers generally understand the application of taxes and rightly assume that any carrier from whom they are contemplating service will be subject to levying such taxes. Although consumers understand their actual bill will be greater as a result of tax addition, they also expect that there will be uniformity among carriers providing service in their particular area in the application of taxes. In direct contrast are the so-called "discretionary charges" which are the subject of this proceeding. "Other surcharges" provides no reasonable information on what types of surcharges a specific carrier is imposing, i.e., regulatory assessment fee, national carrier charge fee, property tax fee, or the dollar impact on the consumer's actual bill from that carrier. Without accurate, up front pricing information consumers are unable to make the type of informed choice contemplated by any vision of a competitive market structure.

Under traditional utility rate making, the so-called "discretionary charges" imposed by various carriers would be cost of service items. Evidence that a carrier experienced an increase in such costs within a rate case scenario would have led to an appropriate increase in the rates for service(s). Under the current scenario permitted by the FCC, carriers are being allowed to increase the effective rate for service(s) without being required to accurately convey that rate information to consumers. The PSCWV believes that the FCC should apply the principles set forth in the *Joint FCC/FTC Policy Statement For the Advertising of Dial-Around And Other Long-Distance Services To Consumers* (March 1,

2000) to all telecommunication carriers within its jurisdiction. Until then, the misleading and deceptive rate information generally provided to telecommunication consumers will remain a major defect in ever approaching a truly competitive market.

Regarding "point of sale disclosure" the PSCWV advocates such full disclosure for all of the reasons in the foregoing arguments. Such "point of sale disclosure" is obviously consistent with the *Joint FCC/FTC Policy Statement For the Advertising of Dial-Around And Other Long-Distance Services To Consumers.* Full disclosure is conducive to promoting a competitive market; continued misleading and deceptive rate information is not. Full disclosure must occur before the consumer signs a contract and evidence of a carrier not providing full disclosure should be grounds for voiding a contract without the consumer incurring early termination fees. In simple truth, the difficulties of shopping for a telecommunications service or carrier are well known to every party to this proceeding and it is past time to take corrective action.

The comments of carriers, e.g., Verizon, state that "point of sale disclosure" is unduly burdensome and costly. Admittedly, Verizon and many other carriers do business and have customers in numerous jurisdictions with varying tax laws and even different mandated surcharges. In each and every instance, the responsibility to be able to explain the bill components to a customer within a specific jurisdiction is the carrier's. If the call center representative is adequately trained to explain the bill components, he/she should be able to calculate it or provide an informative reason why he/she can't. Thus, for example, if the

customer is considering purchasing a flat rate plan for $39.95 per month and the aggregate impact of local, state, and Federal taxes is 10%, the customer is told the total bill will be $43.95 per month. If the customer is considering a plan with a monthly fee of $4.95 and a per minute usage component, the appropriate full disclosure is a monthly rate of $5.45 including taxes and that the billed usage will incur a 10% tax addition. Even if not as difficult as portrayed by Verizon, the PSCWV is far less concerned about jurisdictional taxes (and truly mandated fees) which are uniformly applied to all carriers within a given jurisdiction, than with the full disclosure of so-called "discretionary charges" that vary by carrier. If, for example ignoring the tax issue, a carrier has decided to impose a $1.00 "regulatory assessment fee", the PSCWV would first advocate that the FCC require that carrier to state and/or advertise its $39.95 per month flat rate plan as $44.95 per month and the monthly plan as $6.45, that is, fully disclose the true rate for the service.

It is not difficult for any call center representative to state that the flat rate plan is $39.95 per month and we add a $1.00 surcharge per month. If the carrier elects to levy a 5% "discretionary" surcharge it should do so, if and only if, it has reasonable confidence the call center representative can do the math. How difficult such "discretionary charges" are to explain and/or calculate at the "point of sale"is solely at the literal discretion of the carrier.

II The Federal Communications Commission should not consider its jurisdiction as preempting States from establishing standards for consumer protection

The PSCWV notes its concurrence and support for the positions put forth regarding

Federal preemption in the initial comments of National Association of State Utility Advocates, AARP, the Asian Law Caucus, the Consumer Union, the Disability Rights Advocates, the National Association of State PIRGS, the National Consumer Law Center, the States Attorneys General, that clearly indicate that States have the ability to regulate in this area. In 47 U.S.C. §332(c)(3)(A), Congress expressly reserved State authority over "other terms and conditions" of wireless service. The PSCWV supports the position put forth by the National Association of Attorney Generals (hereinafter referred to as NAAG) in its initial comments, as the second clause of the provision indicates that states' authority over terms and conditions for wireless services is preserved, other than regulations regarding rates and market-entry (NAAG initial comments, page 16). Further, NAAG argued that it was the intent of Congress that the words "terms and conditions'" should be construed broadly, while rates and market-entry are the narrow language that should be preempted.

Additionally, this same section, 47 U.S.C. §332(c)(3)(A) references other Code sections §152(b) and §221(b), which discuss wireline services. Further, 47 U.S.C. §152(b) clearly limits the FCC's authority to preempt State regulation over matters relating to intrastate communications services.

In examining these code sections the PSCWV echoes the position put forth by the National Association of Regulatory Utility Commissioners in its Initial Comments, in that the Congress has already made the determination that State regulation on intrastate communications services does not place any burden on interstate commerce and does not

violate the Commerce Clause.

In regards to the issue of preemption, the PSCWV notes that the ability of the Federal Government to preempt the States is found in the Supremacy Clause of the United States Constitution, Article VI, clause 2. Specifically, as determined in *Louisiana Public Service Commission v. FCC,* 476 U.S. 355, 368 (1986), there are several ways in which preemption may occur, which include: (1) when Congress, in enacting a federal statute, expresses a clear intent to preempt state law; (2) when there is outright or actual conflict between federal and state law; (3) when compliance with both federal and state law, in effect is physically impossible; (4) when there is implicit in federal law a barrier to state regulation; (5) when Congress has legislated comprehensibly, thus occupying an entire field of regulation and leaving no room for the states to implement federal law; or (6) where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress.

In regards to the Dormant Commerce Clause, the PSCWV states that the purpose of the Dormant Commerce Clause denies the States, in some circumstances, the power to take "certain actions respecting interstate commerce even absent congressional action as seen in *CTS Corp. v. Dynamics Corp of America,* 481 U.S. 69,87 (1987). The PSCWV reiterates the position put forth by NAAG, as in this area, Congress has expressly provided that States may regulate carriers' practices other than market-entry and rates, therefore the Commerce Clause proposes no barrier to the States' efforts to assure accuracy and clarity in the carriers' billing procedures (NAAG, initial comments, page 27). In 47 U.S.C. §332(c)(3)(A),

Congress has expressly indicated that States may regulate matters other than the "entry of or the rates charged by" a carrier particularly to "safeguard the rights of consumers." Based on the foregoing, PSCWV echoes the position put forth by NAAG in its initial comments as there appears to be no grounds under the dormant commerce clause to challenge the States' participation in regards to billing practices.

Based on the foregoing, the PSCWV asserts that the proposed preemption in this matter, does not meet any of the established legal justifications for preemption. The PSCWV expounds that in the present matter, the FCC's reliance on arguments put forth by carriers as its sole basis for preemption is in disregard of the normal determination of preemption, where the intent of Congress is the guide in establishing preemption. It is quite clear, that Congress did not intend preemption in the instant matter. As noted in *Hillsborough Cy., Fla. V. Automated Med. Labs. Inc.* 471 U.S. 707, 719 (1985), even when Congress enacts legislation on a particular subject matter, it is indicative of an area of national concern, but it does not necessarily mean that Congress intended to preempt the field. Specifically, in *Hillsborough*, the Court stated that:

> "undoubtedly, every subject that merits congressional legislation is, by definition, a subject of national concern. That cannot mean, however, that every federal statute ousts all related state law. Neither does the Supremacy Clause require us to rank congressional enactments in order of "importance" and hold that, for those at the top of the scale, federal regulation must be exclusive." 471 U.S. at 719.

In the instant matter, the carriers are requesting that the FCC issue an Order declaring that its truth-in-billing regulations exclude State regulation. The PSCWV supports the

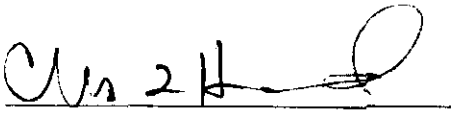
position put forth by NAAG, in that such an Order would undermine the intent of Congress, which is to preserve the states' historic and central role in protecting consumers. Further, the FCC in considering the possibility of preemption, is acting outside the scope of its authority, as it is typically a court that determines preemption not an agency. This contention is supported by numerous legal decisions such as *Colorado PUC v. Harmon*, 951 F.2d 1571 (1991) and *Davis v. Travelers Property and Casualty Co.*, 96 F. Supp. 2d 995 (2000), where in both instances the courts determined that it would be improper to defer to an agency's views on field and conflict preemption.

Finally, the PSCWV supports the arguments put forth by the parties, discussed *supra*, in their initial comments addressing the issue of whether 47 U.S.C. §§ 201(b) and 202 (a) are a base for the preemption of state billing practices. The PSCWV states that these Code sections contain no provision preempting State jurisdiction, but instead set forth the requirement that rates be just and reasonable, and that carriers not establish discriminatory rates or give preferences to any class of customers (NAAG initial comments, page 25).

III Conclusion

Based on the foregoing, the PSCWV respectfully requests that the FCC, issue an Order acknowledging the States' ability to regulate in this field as historically established under the dual concept of federalism.

Respectfully submitted;



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